PUBLIC PROSECUTOR

v.

MOHAMED HALIPAH ADAN

HIGH COURT MALAYA, MUAR
MOHD. YUSOF ABDUL RASHID J
[CRIMINAL TRIAL NO. 7 OF 1978]
4 DECEMBER 1980

CRIMINAL PROCEDURE: *Charge under s. 39B(1) (a) trafficking - Charge in lower Court states "jointly" with others - Written consent of PP filed - Charge amended at High Court trial by DPP who conducted prosecution from "jointly" to "on his own behalf" - No written consent by PP - Effect of trial - Jurisdiction of Court.*

The accused was originally charged in the lower Court under s. 39B(1)(a) of the Dangerous Drugs Ordinance 1952 jointly with some other persons with the consent of the Public Prosecutor as required under s. 39B(3). In the High Court the charge was amended to "on his own behalf" instead of "jointly" by the learned DPP who conducted the prosecution. The defence contended that there being no written consent in relation to the amended charge, the prosecution was bad in law and the Court had therefore no jurisdiction to hear the case.

The question was whether the Court had jurisdiction to proceed with the trial on the amended charge without a fresh consent from the Public Prosecutor.

Held:

[1] Where the prosecution is conducted by a DPP the consent of the Public Prosecutor is implicit in his action and no written consent of the Public Prosecutor is thereby required.

[2] The amendment of the charge by the learned DPP was proper and consequently the Court had jurisdiction to try the accused under the amended charge.

[Sentence of life imprisonment plus 10 strokes of the rotan.]

Cases referred to:
PP v. Lee Chwee Kiok [1979] 1 MLJ 45
PP v. Oie Hee Koi and Associated Appeals [1968] 1 MLJ 148
Lyn Hong Yap v. PP [1956] MLJ 226
Loh Hock Seng & Anor. v. PP [1980] 2 MLJ 13

Legislation referred to:
Criminal Procedure Code, ss. 112, 113
Dangerous Drugs Ordinance 1952, ss. 12, 39B, (1)(a), (3), 40A
Internal Security Act 1960, s. 80

For the prosecutor - Abbas Ismail Rowland, DPP
For the accused - Parjit Singh; M/s. Parjit Singh & Co.

JUDGMENT

Mohd. Yusof Abdul Rashid J:

The accused was charged under s. 39B of the Dangerous Drugs Ordinance 1952, for trafficking in dangerous drugs, to wit, 14.24 grammes of heroin or alternatively 3.62 grammes of morphine. The police received information that one, Syed Jaafar bin Syed

Sheikh, would be able to lead the police to a person who was selling dangerous drugs. On 13 February 1978, Syed Jaafar was contacted at a stall at Jalan Bakri, Muar. A police party comprising DPC 57931 Zainal Azmi bin Mohd. Ali, DPC Aziddin and DPC Azmi posed as potential buyers of dangerous drugs and was led by Syed Jaafar to the accused's house, which was at 3½ milestone Muar Tangkak Road, Parit Bunga, Muar. They went to the accused's house in a car No. BR 6055 at about 3.55 p.m.

DPC 57931, Zainal acted as the principal person interested in buying some dangerous drugs. DPC Zainal, after all the party and the accused were seated in the house, was introduced by Syed Jaafar to the accused as a potential buyer of dangerous drugs. The accused then told DPC Zainal that he had two packets for sale. On being asked the price the accused told DPC Zainal that he was selling it at RM190 per packet. Some bargaining took place and in the end the accused agreed to sell at RM175 per packet. Two packets were produced. DPC Zainal asked the accused to sell him another two packets. The accused agreed and went to the back portion of the house. The accused returned and produced two more packets to DPC Zainal. All four packets containing brownish powder were placed on the table. DPC Zainal then excused himself saying that he had to go to his car BR 6055 to get the money. DPC Zainal went out to car No. BF 6055 and signalled the other party of police personnel waiting with a car No. MC 6721 along the Muar Tangkak Road. DPC Zainal went back into the house and identified himself as police officer. The accused grabbed the four packets which were on the table and tried to run away. DPC Zainal held accused's hands and stopped him from escaping. Then Inspector Ariffin who was one of those official in the other party of police who had waited with motor car no. MC 6721, had entered the accused house. He saw accused holding four packets in his right hand. He then took possession of the said four packets. On examination, the chemist disclosed that the four packets contained 14.24 grammes of heroin and 3.62 grammes of morphine. From the accused person was recovered a sum of RM825.

A search was made of the house and in a room was recovered a sum of RM3,160 and in a tupperware bowl a sum of RM632.35 was recovered.

Under s. 2 of the Dangerous Drugs Ordinance 1952, the word "trafficking" is defined as:

> 'trafficking' includes the doing of any of the following a that is to say, manufacturing, importing, exporting, keep concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.

I am satisfied beyond reasonable doubt that accused was selling 14.24 grammes of heroin and 3 grammes of morphine to DPC 57931 Zainal, who had acted as an agent provocateur, for a sum of RM700. It is common knowledge that the "selling" and "buying" transaction is complete when the parties to sale have made an offer to sell a commodity at certain price and the other has accepted such an order at the said price. Thereafter it remains for the money to change hands which is not the vital part in the transaction for, a sale may yet be on complete credit.

The defence Counsel attacked the evidence of witnesses for the prosecution and submitted that there were discrepancies in their evidence. Now, discrepancies consist of material and minor discrepancies and they may relate to material or incidental. To my mind there were discrepancies but they were minor and related to facts which were not material. The issue of discrepancies was raised to question credibility of the witnesses for the prosecution. I ruled that they were truthful witnesses who admitted creditable evidence.

The first prosecution witness was the Investigating Officer, Inspector Ahmad Nasiruddin. He deposed that on 13 February 1978, he was informed of Sungai Mati Police Report Nos. 447 and 448/78. At Muar Police Station he met Inspector Ariffin who handed to him the accused together with four plastic packets containing light-gray or brownish powder, cash and some other exhibits. On 15 February 1978, he sent the four plastic packets to the chemist through PC 49103 and on 6 March 1978, he received a chemist report and the four plastic packets. On 10 March 1978, he served the chemist report on the accused.

The second witness for the prosecution was Inspector Ariffin who was attached to Melaka Tengah Police Station. Inspector Ariffin was one of the police personnel concerned in the arrest of the accused. After briefing, on 13 February 1978, he accompanied a police party to Muar. At first, in a car No. WL 4920 Inspector Ariffin, OCPD Melaka Tengah, ASP Asari and DPC Zainal proceeded along Jalan Bakri Muar. At a coffee stall, one bearded male Malay, Syed Jaafar, was pointed out to DPC Zainal. Then they proceeded back to the Muar Bridge. The police officers then broke into parties; one travelling in motor car No. BR 6055 in which were DPC Zainal, DPC Azmi and DPC Aziddin and the other party comprising Inspector Ariffin, OCPD Melaka Tengah, ASP Asari and Constable Rosli were travelling in a motor car No. MC 6721. Motor car No. BR 6055 went towards Jalan Bakri followed by motor car No. MC 6721. At the coffee stall, DPC Zainal approached Syed Jaafar and a little later they went into motor car No. BR 6055 and proceeded towards Tanakak. The police party in motor car No. MC 6721 followed a distance away. At 3½ milestone Muar-Tangkok Road, Parit Muar, motor car No. BR 6055 stopped and the occupants went to a house. The police party in motor car No. MC 6721 stationed themselves a distance away and stood alert for any signal to raid the house.

Later Inspector Ariffin saw Constable Rosli give a signal and he ran towards a house nearest to motor car No. BR 6055. On entering the house he saw DPC Zainal holding onto the accused. Inspector Ariffin then took possession of the four packets of drugs held in accused's hand.

Inspector Ariffin then arrested the accused and made a search of accused's person and the house. In the purse in accused's trousers-pocket he recovered a sum of RM825, from inside an almirah in one of the rooms he recovered a sum of RM3,160 and from inside a tupperware bowl he recovered a sum of RM625.35. The accused and all those in the house were taken to Muar Police Station. Inspector Ariffin then lodged police reports - Sungai Mati Police Reports No. 447/78 and No. 448/78. When Inspector Ahmad Nasiruddin came to Muar Police Station, Inspector Ariffin handed to him the accused, the four packets of drug, two straws of drug recovered from Syed Jaafar and the cash.

The most important prosecution witness was Detective Constable Zainal who had acted as agent provocateur to obtain evidence against the accused. This witness testified that on 13 February 1978, he accompanied Inspector Ariffin, OCPD Melaka Tengah and ASP Asari to Muar. In a motor car No. WL 4920 they proceeded to Jalan Bakri where at a coffee stall he was pointed out a bearded male Malay as Syed Jaafar. Thereafter they returned to the Muar Bridge where Detective Constable Zainal boarded another motor car No. BR 6055. Accompanied by Detective Constable Aziddin and Constable Azmi, Detective Constable Zainal proceeded to the same coffee stall at Jalan Bakri Muar followed by another police party travelling in motor car No. MC 6721. At the coffee stall Detective Constable Zainal approached Syed Jaafar. Detective Constable Zainal and the other police officers posed as businessmen interested in buying drugs.

Syed Jaafar had no sufficient amount of drug and he agreed to introduce Detective Constable Zainal and friends to another supplier. Syed Jaafar and Detective Constable Zainal boarded motor car No. BR 6055 and they proceeded towards Tangkak. Motor car No. BR 6055 was followed by motor car No. MC 6721.

At 3½ milestone Muar-Tangkak Road, Parit Bunga motor car BR 6055 stopped at a house. All of them went into the house. When they were all seated Syed Jaafar talked to the accused. Then the accused asked Detective Constable Zainal how much drugs did he want to buy. The accused had with him two packets of drug then and produced both packets. The accused wanted to sell each packet of drug at RM190 but Detective Constable Zainal bargained and finally the accused agreed to sell at RM175 per packet. Detective Constable Zainal wanted to buy two more packets and the accused left and went to the back part of the house. The accused returned with two packets and put all the four packets on the table. The accused agreed to sell all the four packets of drugs at RM700 and Detective Constable Zainal agreed to pay such price. Detective Constable Zainal then excused himself by telling the accused that he had to get the money from the car. He left. When Detective Constable Zainal came to motor car No. BR 6055 he pretended to take something from inside the car. Then he gave a signal. Detective Constable Zainal then went back to the house. He and the other police officers identified themselves as police and told those in the room to remain where they were. The accused grabbed the four packets of drugs and tried to escape but Detective Constable Zainal managed to hold on to the accused's hands and apprehended him. At that moment Inspector Ariffin entered the house and arrested the accused. From the accused 's hand Inspector Ariffin took possession of the four packets of drug.

Generally, the Court is always wary in accepting the evidence of an agent provocateur but in this case the Legislature under s. 40A of the Dangerous Drugs Ordinance 1952, had dictated that the evidence of any agent provocateur shall be admissible and treated as any other evidence from any ordinary witness. The said s. 40A provided

> 40A. Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under s. 398 or regulations made thereunder if the attempt to abet or abettment was for the sole purpose of securing evidence against such person.

It is indeed difficult to secure evidence in the normal way where an offence under s. 39B of the Ordinance is concerned and the act of the police in resorting to this method of using an agent provocateur, though undesirable, is necessary in circumstances where drug trafficking has become a national issue, which may lead to national crisis. By virtue of s. 40A of the Ordinance the evidence of an agent provocateur need no corroboration to found a finding by a Court, however, Detective Constable Zainal's evidence was amply corroborated by the evidence of Inspector Ariffin and the cautioned statement of the accused.

The fourth prosecution witness was Police Superintendent Abdul Rahim bin Mohd. Noor who in February 1978 was the OCPD Melaka Tengah. His evidence was similar to that of Inspector Ariffin. So was the evidence of the fifth prosecution witness, ASP Asari bin Hj. Mokhtar who in February 1978 was the Assistant OCPD Melaka Tengah. The sixth witness for the prosecution was the police photographer who took several photographs of the scene.

Inspector Hamid bin Hj. Mohd. Nor was the seventh witness for the prosecution and he was the officer who took down the cautioned statement of the accused. The cautioned statement was taken on 19 February 1978, at about 3.20 p.m. at Muar Police Station. When the Counsel for the accused objected to the admissibility of the cautioned statement, a trial within a trial was conducted.

Inspector Hamid testified that he recorded the statement of the accused under s. 113 of the Criminal Procedure Code in a room in Muar Police Station. Accused was brought into the room and Inspector Hamid at first administered and explained the caution under s. 113 of the Criminal Procedure Code to the accused who understood the nature and consequences of the said caution. Inspector Hamid spoke to the accused in Bahasa Malaysia. Before Inspector Hamid recorded the statement, no threat, inducement or promise was administered on the accused. Throughout the recording of the statement which was reduced to type-written form simultaneously, Inspector Hamid said the accused had given his statement voluntarily and freely.

In the trial within a trial proceedings, the accused gave evidence on oath that an already prepared type-written statement was handed to him to sign and when he refused to sign, the accused alleged that Inspector Hamid assaulted and threatened him. The statement was never read over to him nor was any caution administered. The accused alleged that it was after being beaten and assaulted that he was compelled to sign the statement without knowing the contents thereof.

One thing took me by surprise and that was the accused twice said in answer to the questions put by the learned defence Counsel that Inspector Hamid forced and threatened him **to say** the things said in the statement. On another occasion the accused said that he denied **having made** the statement **voluntarily**.

It was given by force. In the circumstances it was difficult for me to reconcile contradicting statement of the accused. On one hand he said the type-written statement was prepared well before he saw Inspector Hamid and the accused was forced to sign the type-written statement. In another breath he alleged that he did make the statement but he was forced, threatened and assaulted into making such statement and so the statement was not made voluntarily. The accused was most unconvincing.

I adjourned the Court after hearing the evidence of Inspector Hamid and the accused and the submissions of learned Counsel for the accused and the learned Deputy Public Prosecutor to consider the admissibility of the cautioned statement. On examining the statement I found a lot of background information regarding the accused, which could not possibly obtainable from any other person than the accuse was included in the statement. It was not probable that Inspector Hamid had made up those background information. The information disclosed in the other part of the statement could only be derived from the accused, since the accused in the statement stated what exactly had happened on that day, 1 February 1978. Not directly involved in the case except for the purpose of recording statements under s. 113 of Criminal Procedure Code, Inspector Hamid could not have known the minute detail of what had happened that day unless told by the accused himself. Further, Inspector Hamid could not possibly had concocted the name Mohd. Kijeb.

As I found the evidence of the accused unsatisfactory and having heard and observed Inspector Hamid giving evidence and having examined the statement in detail, I was satisfied that the accused was never assaulted or threatened before he gave his statement

and I ruled that the accused did make the statement and that the statement was made voluntarily. Since the requisite caution had been satisfactorily administered, the said statement was admissible under s. 113 of the Criminal Procedure Code.

In the cautioned statement the accused said, *inter alia,* to this effect:

> On 13 February 1978, about 3.00 p.m. a friend of named Syed Jaafar came to his house with some friends. Syed Jaafar told accused that his friends wished to buy drug. The accused asked Syed Jaafar's friends how much drug they want to buy. One of them said 2 packets. The accused told him that he was selling each packet for RM190. One of them started bargaining. Finally the accused agreed to sell at RM175 per packet. The accused further disclosed that he had bought the drug at RM160 per packet from one, Mohd. Kijeb. Syed Jaafar's friend wanted to buy four packets all at RM175 and agreed to pay RM700 for all. The accused had only two packets with him, so he went to the back of the house and took two more packets from a clump of banana plants. The accused then returned and handed all the four packets of drug to Syed Jaafar's friend.
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> This friend of Syed Jaafar then went out to get the money and then he returned. On his return this man and his friend identified themselves as police officers and arrested all them. The accused said, from him was recovered four packets of drug and from Syed Jaafar was recovered two straws of drug.

In the light of the case for the prosecution as whole I had no doubt that these facts disclosed by accused were true.

The prosecution witness No. 8, DPC 63033 Rosli bin Ahmad and prosecution witness No. 9, PC 65558 Aziddin bin Isa repeated the evidence of the other witnesses regarding the raid of the house and the arrest of the accused and the others in the house. No useful purpose is served in dwelling any further on the evidence they adduced.

At the end of the case for the prosecution, I ruled that the prosecution had established *prima facie* evidence against the accused on the main and alternative charges, and if unrebutted would warrant a conviction. I called the accused to enter his defence.

From the Bar the learned defence Counsel sought the assistance of the police to make available Syed Jaafar against whom a subpoena had been issued but remain unserved; the defence Counsel urged the Court to direct the police to trace and disclose the whereabout of Syed Jaafar. In reply the learned Deputy Public Prosecutor said that Syed Jaafar was charged in the lower Court for possession of the straw of drugs and he was accordingly convicted. The police had not recorded Syed Jaafar's statement under s. 112 of the Criminal Procedure Code and was unable to help since the police too did not know the whereabouts of Syed Jaafar. Since all attempts which had been made to trace Syed Jaafar had proved futile I found no valid ground to grant any further postponement to the defence until such time as Syed Jaafar be detected. I ordered the accused to make his defence forthwith on the next day.

The accused in his defence denied that he had sold four packets of drugs to Detective Constable Zainal. The accused denied making the statement to Inspector Hamid to that effect. The accused testified that two persons came to the house looking for his elder brother, Shukor. They were invited into the house. The accused then left to prepare drinks for them. When he went back to the living room Detective Constable Zainal with a gun in his hand arrested the accused. He was handcuffed. On the table the accused saw a bundle wrapped in newspaper. He denied having knowledge of its contents. Other police officers came from the back of the house. In the living room the accused and his brother Shukor were assaulted.

The accused called upon one Ponesuaran s/o Muthusamy, a self-confessed criminal who was even then serving sentence, as a witness. Ponesuaran alleged that he was in the house adjusting the TV set aerial in the living room. He purported to corroborate the testimony of the accused.

Another witness called by the defence was one, Affendi bin Ahmad, who said that he was in the house on the material day and time assisting Ponesuaran in adjusting the TV aerial. This Witness who purported to corroborate the accused's story tended to be short of memory where details were concerned. It was obvious to me that this witness knew and understood English but chose to speak in Bahasa Malaysia. In that way he was able to play for time before answering the questions put by the learned Counsel and the learned Deputy Public Prosecutor.

The accused's mother, Rokiah bt. Idros, in evidence was not aware of exactly what had happened but explained where the monies, RM3,160 and RM632.35 came from. I was satisfied from her evidence that these sums were not monies obtained as a result of the sale of drugs.

It seemed to me that the accused by inference wished to urge that it was the police who planted the drug on him and he in fact was not concerned with drugs. He attempted to discredit the police when he alleged that he and his elder brother Shukor were assaulted by the police. It baffled logic and common sense if the Court were to accept such testimony. If it was the intention of the police "to work on" the accused they would not be as foolhardy as suggested within the sight of witnesses.

The defence preferred a story which was totally different from that disclosed in the cautioned statement. I had no doubt at all that the facts disclosed in the cautioned statement were divulged voluntarily and were true. In the circumstances, I could not believe the story of the accused as adduced in Court.

Having considered the defence carefully and the evidence adduced before me in totality, I found it difficult to believe the story of the defence and without hesitation rejected it. The defence had failed to raise any reasonable doubt in my mind and I found the accused guilty of the main and alternative charges.

The learned defence Counsel in his submission raised the question of consent of the Public Prosecutor under s. 39B(3) of the Dangerous Drugs Ordinance. In the lower Court the Public Prosecutor had consented to the institution of the prosecution against the accused on a charge under s. 39B(1)(a) **jointly** with some other persons. However, before me, the charge was amended to "on his own behalf" instead of "jointly" and that there was no other accused person besides the accused. The learned defence Counsel complained that in relation to the amended charge the Public Prosecutor had not given his written consent under the said section. Hence, as the prosecution of the accused was bad in law for want of consent of the Public Prosecutor, I had no jurisdiction to try the case. For authority, the learned defence Counsel cited the case of *PP v. Lee Chwee Kiok* [1979] 1 MLJ 45. In that case Harun J ruled that:

> (1). The trial was a nullity as the Public Prosecutor had not given his consent on the amended charge;

and the facts leading to the ruling were as follows:

> The accused was originally charged with trafficking in dangerous drugs on 21 July 1976, at TBG 1306, Jalan Harper Kelang under s. 39B(1)(a) of the Dangerous Drugs Ordinance. On 25 November 1976, the Public Prosector issued his written consent to prosecute under

s. 39B(3) of the same Ordinance. He was first produced before the Magistrate at Kelang on 16 December 1976, and at the close of the Preliminary Enquiry on 28 January 1977 he was committed to stand trail at the High Court on the same charge.

When the trail commenced before me however, on 19 September 1977, the learned Deputy Public Prosecutor amended the charge in two aspects:

(i) the offence was alleged to have been committed at TBG 1306A, Jalan Harper, Kelang.

(ii) the offence alleged was that of doing an act preparatory to trafficking under s. 39B(10(c) of the Dangerous Drugs Ordinance.

The question is whether the Court has jurisdiction to proceed with the trial on the amended charge without a fresh consent from the from the Public Prosecutor ...

His Lordship, after taking several authorities into consideration said:

... the facts of the case were fully before the Public Prosecutor at the same time of giving his consent and he could have elected to proceed on the amended charge then. He did not do so. It would appear therefore that the Public Prosecutor has not given his consent to prosecute under the amended charge. That being so, the trial is a nullity on the authority of *Lyn Hong Yap v. PP.*

It was noted nevertheless that the attention of Harun J was not drawn to the Privy Council case of *PP v. Oie Hee Koi & Associated Appeals* [1968] 1 MLJ 148. Had his Lordship been advised accordingly, his Lordship might be able to distinguish the decision of the Court of Appeal in *Lyn Hong Yap's* [1956] MLJ 226 from the case considered by his Lordship then and perhaps his Lordship might come to a different conclusion.

Harun J was considering the effect of s. 39B(3) of the Dangerous Drugs Ordinance which provides:

(3) The prosecution under this section shall not be instituted except by or with the consent of the Public Prosecutor.

While the Privy Council was urged to give an interpretation to the provision of s. 80 of the Internal Security Act which provides:

80. A prosecution for an offence under this Act punishable with imprisonment with a term of 7 years or more shall not be instituted except with the consent of the Public Prosecutor ...

It is submitted that the above provisions are in *pari materia.*

Their Lordships the Privy Council at p. 154 in the case of *Ooi Hee Koi* Said:

... It was further argued that under s. 80 of the Act the consent of the Public Prosecutor to the prosecution should have been and was not obtained. The answer to this objection is that the Public Prosecutor was himself the prosecutor and his consent was implicit in his action. The provision in s. 80 requiring consent is applicable were prosecution takes place, e.g. before a Session Court and the Public Prosecutor is not the actual prosecutor.

It is to be noted that in the above case the prosecution was conducted before the High Court by a Deputy Public Prosecutor who under the Criminal Procedure Code is vested with all the powers of the Public Prosecutor. On the authority of this case, it is clear that where the prosecution is conducted by a Deputy Public Prosecutor the consent of the Public Prosecutor is implicit in his action and no written consent of the Public Prosecutor is required.

Before Harun J the prosecution who conducted by a Deputy Public Prosecutor but this was not the case in *Lyn Hong Yap*, the prosecution of which was before the President of the Session Court, conducted by a Police Officer as Prosecuting Officer.

In the circumstances, I rule that the amendment of the charge by the learned Deputy Public Prosecutor was proper and that I have jurisdiction to try the accused under the amended charge.

The learned Deputy Public Prosecutor pressed for the maximum sentence to be imposed on the accused and cited *Loh Hock Seng & Anor. v. PP* [1980] 2 MLJ 13. Only two sentences might be passed by me and they were death which is the maximum or life imprisonment. I could only pass a sentence of caning.

In *Loh Hock Seng v. PP*, the facts were:

> ... the appellants had been convicted on a charge of trafficking in 1550.1 grammes of heroin. Hong Hoo Chong, the second appellant, was sentenced to imprisonment for life and 14 strokes of the rotan. He appealed against the sentence imposed.
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> **Held:** In the circumstances of this case, the imposition of a term of imprisonment for life is wholly inadequate as it does not reflect the gravity of the offence and the circumstances of the case against the appellant, his record of previous convictions, the public interest involved in respect of crimes of this nature and a sufficient factor of deterrence to others of his ilk. The sentence of death should therefore be substituted for the life and whipping.

His Lordship Raja Azlan Shah CJ (Malaya) in delivering the judgment of the Federal Court at p. 14 said:

> Sentencing in a criminal case must of course bear relation to the particular circumstances of the offender as well as the particular circumstances of the offence. The Legislature has in its wisdom and in the implementation of its plenary powers in this respect enacted the imposition of the alternative penalties of death or imprisonment for life under s. 39B of the Ordinance with the option and discretion in this regard to be no doubt judicially and judiciously exercised according to the facts and circumstances of a particular case, and we can see no reason whatsoever why the statutory enactment of the option for punishment by death cannot and should not be made functionally operative and exercised and applied *proprio vigore* if the circumstances and facts of the case so warrant, justify, require and perhaps even demand ...
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> Turning to the second appellant's case, he was convicted on clear evidence quite apart from his own statement taken on a caution property administered and which was admitted at his trial. The amount of heroin involved is very substantial, 1550.1 grammes to be exact, and he also has several previous convictions for armed robbery, house-breaking and theft and one for possession of heroin under s. 12 of the Ordinance. There would appear to be no redeeming features but the learned Judge states in his grounds of judgment that after some hesitation in considering the sentence to be imposed he decided he would give the second appellant one more chance, presumably in the stock phrase to turn over a new leaf. In our view the learned Judge had the percipience to see the special malignancy of the offence and the antecedents of the offender but not the courage to reflect it in the sentence ...

I would not hesitate to impose the maximum penalty authorised by law had the accused's antecedents in the instant case called for the imposition of the death penalty. Unlike the case considered by the Federal Court, the accused in the instant case was a first offender and had got himself involved only three months before he was arrested. The amount of drugs involved was not very substantial. In the circumstances, I was of the view a sentence of life imprisonment was adequate. Accordingly the said sentence was pronounced and in addition I imposed a sentence of whipping with 10 strokes of the rotan.

The sum recovered from the accused amounting to RM825 was forfeited but the sums of RM3,160 and RM632.35 recovered from the other parts of the house were ordered to be returned to the accused's mother as I was not satisfied that they were sums involved in any way with the trafficking of drug of which offence the accused was found guilty.

Also found at [1981] CLJ 92